In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1346

DOUGLAS C. BOYD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1975, and a petition for rehearing was denied on January 19, 1976. The petition for a writ of certiorari was not filed until March 18, 1976, and therefore is 28 days out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether marihuana seized from petitioner's automobile during a pre-*Almeida-Sanchez* search at a

Border Patrol immigration traffic checkpoint was properly admitted in evidence at trial.

2. Whether petitioner was denied a speedy trial.

3. Whether the district court abused its discretion by deferring until trial the determination of petitioner's pre-trial motion to suppress the fruits of the checkpoint search.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, to be followed by a special parole term of two years. The court of appeals affirmed (Pet. App. A).

On February 3, 1973, the automobile in which petitioner and a female companion were riding was stopped by Border Patrol agents at the immigration traffic checkpoint maintained by the Border Patrol near Sarita, Texas, about 85 miles from the Mexican border. Petitioner, appearing tense and nervous, was asked to open the trunk of the car. When he did so, a Border Patrol agent smelled marihuana. The agent opened three suitcases found in the trunk and discovered 143 pounds of marihuana, a sample of which was subsequently introduced in evidence at petitioner's trial (Tr. 18, 56-62, 92). Petitioner's pretrial motion to suppress the marihuana was consolidated with the trial and denied when the case was submitted to the jury (Tr. 182).

ARGUMENT

1. Petitioner contends that the marihuana should have been suppressed under this Court's decisions in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, and

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United States v. *Ortiz*, 422 U.S. 891. But this Court has already held that the principles of *Almeida-Sanchez* are not to be applied retroactively to invalidate checkpoint searches conducted prior to June 21, 1973. *Bowen* v. *United States*, 422 U.S. 916. Since the search here was conducted on February 3, 1973, *Bowen* is dispositive of petitioner's contention.

2. Petitioner's claim that he was denied a speedy trial is likewise without merit. In *Barker* v. *Wingo*, 407 U.S. 514, this Court identified several factors to be assessed in determining whether a defendant has been denied his right to a speedy trial. These include the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant (407 U.S. at 530). In this case, the record shows that the lapse of thirteen and one-half months between petitioner's indictment on April 17, 1973, and his trial on June 3, 1974, was caused by a combination of petitioner's own actions and a crowded court calendar.[1]

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[1]On August 18, 1975, the court of appeals remanded the case to the district court for supplemental findings of fact on the cause of the delay between petitioner's arraignment and trial. The district court's findings, entered on November 4, 1975, revealed that petitioner's original arraignment, scheduled for May 24, 1973, well within the 45-day time limit established in the district court's plan for prompt disposition of criminal cases, was postponed upon the representation of his counsel that petitioner was seeking new counsel. Petitioner's second arraignment, scheduled for June 15, 1973, was postponed upon petitioner's failure to appear. Petitioner was eventually arraigned on July 6, 1973. On April 9, 1974, two days prior to a scheduled pre-trial hearing on petitioner's motion to suppress, petitioner moved for a continuance due to his counsel's illness. The case was reset for trial on June 3, 1974, and the trial commenced on that date.

The district court also found that the nine months between petitioner's July 1973 arraignment and April 1974 motion for continuance were marked by a severely congested court docket that prevented petitioner's trial during that period. The court documented its conclusion with court records indicating voluminous trial and pretrial activity.

The record does not reflect, and petitioner does not allege, any attempt by the government to hamper his defense through unnecessary delay (see 407 U.S. at 531). Moreover, at no time prior to his trial did petitioner assert his right to a speedy trial. Finally, petitioner's sole allegation of prejudice caused by pre-trial delay appears to be that, if his trial had been held earlier, prior to this Court's decision in *Bowen*, he might have been the beneficiary of an erroneous retroactive application to his case of the principles of *Almeida-Sanchez*. But even if such an error would not subsequently have been corrected, the asserted "harm" cannot fairly be advanced as prejudice cognizable under the *Barker* standards.

3. Petitioner contends (Pet. 6) that the district court erred by deferring until trial the determination of his pre-trial motion to suppress the fruits of the checkpoint search, thereby permitting the jury to hear possibly irrelevant and inadmissible evidence and precluding him from testifying in support of his motion without subjecting himself to cross-examination in front of the jury. Rule 12(e), Fed. R. Crim. P., however, clearly permits the district court, for good cause, to defer until trial its decision on pre-trial motions. *United States* v. *Covington*, 395 U.S. 57, 60; *United States* v. *Spagnuolo*, 515 F.2d 818, 820 (C.A. 9). Here the indictment alleged possession of marihuana with intent to distribute it. The marihuana was discovered during a routine search at an immigration checkpoint. Testimony concerning the search was therefore admissible both on the suppression motion and as part of the government's case-in-chief. Had the search been found unlawful, the government's case would have failed. Thus, the court's decision to consolidate the suppression hearing with the trial furthered the interest of judicial economy and did not result in the introduction of irrelevant or prejudicial testimony.

Moreover, the court made clear at the outset of the trial its intention to excuse the jury whenever it would become appropriate to hear testimony concerning the suppression motion out of the jury's presence (Tr. 5-7). Petitioner did not seek to testify in support of his motion and specifically declined an invitation to present evidence outside the presence of the jury (Tr. 116). Petitioner's present assertion that he "could only effectively contest the Motion to Suppress if he would subject himself to cross-examination in the presence of the jury" (Pet. 6) is thus refuted by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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